

ESTTA Tracking number: **ESTTA367534**Filing date: **09/09/2010**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**Petition for Cancellation**

Notice is hereby given that the following party requests to cancel indicated registration.

**Petitioner Information**

Name	Barry D. Sears		
Entity	Individual	Citizenship	UNITED STATES
Address	21 Tioga Way Marblehead, MA 01945 UNITED STATES		

Attorney information	Deborah L. Benson Hinckley, Allen & Snyder, LLP 28 State Street Boston, MA 02109 UNITED STATES tmdocket@haslaw.com, jblackowicz@haslaw.com Phone:617-345-9000
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**Registration Subject to Cancellation**

Registration No	3800075	Registration date	06/08/2010
Registrant	Nutrilab Corporation Suite 512 111 2nd Avenue N.E. St. Petersburg, FL 337014360 UNITED STATES		

**Goods/Services Subject to Cancellation**

Class 005. First Use: 2008/03/25 First Use In Commerce: 2008/03/25 All goods and services in the class are cancelled, namely: Nutraceuticals for use as a dietary supplement, namely, low glycemic, non-cephalic, sweet L-arginine powder for use in foods for oral ingestion by humans
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**Grounds for Cancellation**

Priority and likelihood of confusion	Trademark Act section 2(d)
Other	Lack of Bona Fide Use

Related Proceedings	Opposition No.: 91168495
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**Marks Cited by Petitioner as Basis for Cancellation**

U.S. Registration No.	2689749	Application Date	05/22/2000
Registration Date	02/25/2003	Foreign Priority Date	NONE
Word Mark	ZONE		

Design Mark	
Description of Mark	NONE
Goods/Services	Class 016. First use: First Use: 1995/05/00 First Use In Commerce: 1995/05/00 Publications, namely a series of books in the field of diet and nutrition

U.S. Registration No.	3059308	Application Date	10/03/2003
Registration Date	02/14/2006	Foreign Priority Date	NONE

Word Mark	DR. SEARS ZONE
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Design Mark	
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Description of Mark	The mark is comprised of the stylized words "Dr. Sears" above the word "ZONE," with the letter "O" overlapping the letter "Z," in "ZONE."
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Goods/Services	<p>Class 041. First use: First Use: 2004/05/21 First Use In Commerce: 2004/05/21 Providing on-line magazines, newsletters, bulletins, in the fields of diet, health, and nutrition; providing on-line newsletters in the fields of diet,health and nutrition by e-mail</p> <p>Class 043. First use: First Use: 2005/01/28 First Use In Commerce: 2005/01/28 catering services; restaurant, cafe and snack bar services</p> <p>Class 044. First use: First Use: 2004/05/21 First Use In Commerce: 2004/05/21 computer services, namely, providing counseling services, information, and educational information in the fields of health and nutrition via the Internet; counseling services in the field of diet, health and nutrition, providing information in the fields of diet, health, and nutrition via e-mail</p>
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U.S. Registration No.	3128070	Application Date	03/14/2005
Registration Date	08/08/2006	Foreign Priority Date	NONE


Word Mark	ZONE FAST
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Design Mark	
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Description of Mark	NONE
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Goods/Services	Class 041. First use: First Use: 2005/04/09 First Use In Commerce: 2005/04/09
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	Educational services, namely, conducting workshops, seminars and classes in the field of diet, health and nutrition and distributing course materials in connection therewith; providing educational information in the fields of health and nutrition
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U.S. Registration No.	3171421	Application Date	12/30/2005
Registration Date	11/14/2006	Foreign Priority Date	NONE
Word Mark	DR. SEARS ZONE		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 030. First use: First Use: 2005/11/28 First Use In Commerce: 2005/11/28 Breakfast cereals		

U.S. Registration No.	3171422	Application Date	12/30/2005
Registration Date	11/14/2006	Foreign Priority Date	NONE
Word Mark	DR. SEARS ZONE		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 030. First use: First Use: 2005/11/28 First Use In Commerce: 2005/11/28 Breakfast cereals		

U.S. Registration No.	3254087	Application Date	09/17/2003
Registration Date	06/19/2007	Foreign Priority Date	NONE
Word Mark	ZONE LABS		

Design Mark	
Description of Mark	NONE
Goods/Services	Class 003. First use: First Use: 2003/11/00 First Use In Commerce: 2003/11/00 non-medicated skin care preparations and cosmetics Class 005. First use: First Use: 2003/11/00 First Use In Commerce: 2003/11/00 vitamins, nutritional supplements, and nutritional food bars

U.S. Registration No.	3176214	Application Date	04/29/2005
Registration Date	11/28/2006	Foreign Priority Date	NONE
Word Mark	DR. SEARS ZONEDIET.COM		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 041. First use: First Use: 2004/05/21 First Use In Commerce: 2004/05/21 Providing online magazines and newsletters in the fields of diet, health, and nutrition; providing online newsletters in the fields of diet, health and nutrition by e-mail		

U.S. Registration No.	3066468	Application Date	01/24/2005
Registration Date	03/07/2006	Foreign Priority Date	NONE
Word Mark	DR. SEARS ZONE		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 035. First use: First Use: 2003/11/00 First Use In Commerce: 2003/11/00 Retail store, catalog and mail order services featuring vitamins and nutritional supplements, nutritional food bars, health foods, and publications in the fields of diet, health and nutrition		

U.S. Registration No.	3174669	Application Date	01/24/2005
Registration Date	11/21/2006	Foreign Priority	NONE

		Date	
Word Mark	DR. SEARS ZONE APPROVED		
Design Mark	<p style="text-align: center;"><b>DR. SEARS ZONE APPROVED</b></p>		
Description of Mark	NONE		
Goods/Services	Class 035. First use: First Use: 2005/11/16 First Use In Commerce: 2005/11/16 mail order services featuring vitamins and nutritional supplements, nutritional food bars, health foods, computer software and publications in the fields of diet, health and nutrition		

U.S. Registration No.	3074328	Application Date	09/18/2003
Registration Date	03/28/2006	Foreign Priority Date	NONE
Word Mark	DR. SEARS ZONE LABS		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 035. First use: First Use: 2003/11/00 First Use In Commerce: 2003/11/00 On-line retail store and mail order services featuring vitamins and nutritional supplements, nutritional food bars, health foods, edible oils and fats, non-medicated skin care preparations and cosmetics, and printed publications in the fields of diet, health and nutrition		

U.S. Registration No.	3161339	Application Date	01/24/2005
Registration Date	10/24/2006	Foreign Priority Date	NONE
Word Mark	ZONE		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 035. First use: First Use: 2003/11/00 First Use In Commerce: 2003/11/00 Retail store, catalog ordering and mail order services featuring vitamins and nutritional supplements, nutritional food bars, health foods, computer software and publications in the fields of diet, health and nutrition		

U.S. Registration No.	3080411	Application Date	09/18/2003
Registration Date	04/11/2006	Foreign Priority Date	NONE
Word Mark	ZONE LABS		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 035. First use: First Use: 2003/11/00 First Use In Commerce: 2003/11/00 on-line retail store, and mail order services featuring vitamins and nutritional supplements, nutritional food bars, health foods, edible oils and fats, non-medicated skin care preparations and cosmetics, and printed publications in the fields of diet, health and nutrition		

U.S. Application/Registration No.	NONE	Application Date	NONE
Registration Date	NONE		
Word Mark	ZONE		
Goods/Services	Education and counseling services in the fields of diet, health and nutrition, meal planning services		


U.S. Application/Registration No.	NONE	Application Date	NONE
Registration Date	NONE		
Word Mark	ZONE DIET		
Goods/Services	Education and counseling services in the fields of diet, health and nutrition, meal planning services		


U.S. Application/Registration No.	NONE	Application Date	NONE
Registration Date	NONE		
Word Mark	ZONE CRUISE		
Goods/Services	Education and counseling services in the fields of diet, health and nutrition, meal planning services		

U.S. Application/Registration No.	NONE	Application Date	NONE
Registration Date	NONE		
Word Mark	ZONE CONSULTANTS		
Goods/Services	Education and counseling services in the fields of diet, health and nutrition, meal planning services		


U.S. Application/Registration No.	NONE	Application Date	NONE
Registration Date	NONE		
Word Mark	THE OMEGA ZONE		
Goods/Services	Printed materials, namely newsletters and magazines in the fields of diet, health and nutrition, providing on-line newsletters and magazines in the field of diet, health and nutrition		


U.S. Application/	NONE	Application Date	NONE
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Registration No.			
Registration Date	NONE		
Design Mark			
Goods/Services	Vitamins, nutritional supplements, nutritional food bars for use as a nutritional supplement or meal replacement; prepared entrees consisting primarily of meat, fish, poultry or vegetables, edible oils and fats, nutritional food bars, namely protein based nutrient dense meal snack bars		
U.S. Application/ Registration No.	NONE	Application Date	NONE
Registration Date	NONE		

Design Mark			
Goods/Services	Printed materials namely, a series of books in the field of diet, health and nutrition		
U.S. Application/ Registration No.	NONE	Application Date	NONE
Registration Date	NONE		



Design Mark			
Goods/Services	Educational services, namely conducting workshops, seminars and classes in the fields of diet, health and nutrition, providing on-line magazines, newsletters, bulletins, in the fields of diet health and nutrition and providing on-line newsletters in the fields of diet, health and nutrition by e-mail; providing information in the fields of diet, health and nutrition via e-mail		
U.S. Application/ Registration No.	NONE	Application Date	NONE
Registration Date	NONE		

Design Mark			
Goods/Services	Non-medicated skin care preparations and cosmetics		

U.S. Application/ Registration No.	NONE	Application Date	NONE
Registration Date	NONE		
Word Mark	ZONE LABS		
Goods/Services	Non-medicated skin care preparations and cosmetics; vitamins, nutritional supplements and nutritional food bars		

Attachments	76553547#TMSN.jpeg ( 1 page )( bytes ) 78586827#TMSN.jpeg ( 1 page )( bytes ) 78783017#TMSN.jpeg ( 1 page )( bytes ) 78783031#TMSN.jpeg ( 1 page )( bytes ) 78620316#TMSN.jpeg ( 1 page )( bytes ) 76628969#TMSN.gif ( 1 page )( bytes ) 76978324#TMSN.gif ( 1 page )( bytes ) 76628966#TMSN.jpeg ( 1 page )( bytes ) ZONE.jpg ZONE1.jpg ZONE2.jpg ZONE3.jpg Petition_for_Cancellation_-_SWEET_ZONE_&_Design-#882616-v1-BOSTON.pdf ( 19 pages )(62658 bytes )
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### Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by Overnight Courier on this date.

Signature	/s/ Deborah L. Benson/
Name	Deborah L. Benson
Date	09/09/2010

IN THE UNITED STATES PATENT & TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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BARRY D. SEARS,	)	
	)	
Petitioner,	)	<u>Cancellation No.:</u>
	)	<u>Reg. No.:</u> 3,800,075
v.	)	<u>Mark:</u> SWEET ZONE & Design
	)	<u>Class:</u> 5
NUTRILAB CORPORATION,	)	
	)	
Respondent.	)	
_____	)	

PETITION FOR CANCELLATION

Barry D. Sears, Ph.D., a United States citizen, with an address of 21 Tioga Way, Marblehead, Massachusetts 01945 (“Petitioner” or “Dr. Sears”), believes that he has been and will continue to be damaged by the United States Trademark Registration for SWEET ZONE & Design, App. Serial No. 77/424,798, Reg. No. 3,800,075 for “Nutraceuticals for use as a dietary supplement, namely, low glycemic, non-cephalic, sweet L-arginine powder for use in foods for oral ingestion by humans” in International Class 5 owned by Nutrilab Corporation, a Florida corporation with an address of Suite 512 111 2nd Avenue N.E. St. Petersburg, Florida 33701 (hereinafter “Respondent” or “Nutrilab”) and hereby petitions to cancel such registration pursuant to § 14(3) of the Lanham Trademark Act of 1946, 15 USC § 1064(3). As grounds for this Petition, Dr. Sears alleges as follows:

## FACTS

1. Dr. Sears is the owner of the trademark ZONE and other marks incorporating ZONE as the dominant portion thereof for health and nutrition products and services designed to help people balance their hormonal and insulin levels.
2. Dr. Sears uses the trademark ZONE and composite marks, all incorporating ZONE as the dominant portion thereof, in connection with a wide variety of branded health and nutrition products and services, including dietary supplements, vitamins, prepared foods, meal replacement shakes, nutrition bars, print and electronic publications and educational services.
3. Dr. Sears is the scientist and author who achieved considerable fame in connection with the lifelong hormonal and insulin control program that he first created over fifteen (15) years ago.
4. Dr. Sears' program uses food as a drug to help people control and balance their hormonal and insulin levels to achieve maximum mental productivity and as a means to improved health and weight loss.
5. In 1995, Dr. Sears branded his writing, teaching and consulting on the benefits of an insulin balanced hormonal control diet with the term, "ZONE."
6. The term ZONE in Dr. Sears' ZONE trademark and his composite marks incorporating ZONE, is not used in its ordinary sense to mean "an area" -- e.g., "play zone" describing a specific area dedicated to playing.
7. ZONE as used by Dr. Sears is fanciful.
8. Dr. Sears is well known as the source of ZONE branded health, diet and nutrition products and services.

9. Dr. Sears has authored numerous ZONE branded books that are premised upon using food as a drug to control and balance hormonal and insulin levels, including The Zone, Mastering the Zone, Zone Food Blocks, The Anti-Aging Zone, A Week in the Zone, The Soy Zone, The Top One Hundred Zone Foods, The OmegaRx Zone and The Anti-Inflammatory Zone.

10. Several of these books have appeared on The New York Times bestseller list.

11. Dr. Sears' The Zone was number one on The New York Times bestseller list in 1996 and remained on that list for approximately twenty (20) weeks.

12. More than five million hard cover copies of Dr. Sears' ZONE branded books have been sold in the United States alone.

13. Dr. Sears' works have been translated into twenty two (22) languages and are sold in at least forty (40) foreign countries.

14. Dr. Sears' ZONE diet products and services pay special attention to the glycemic index of foods, which is a way to measure how quickly a food becomes sugar in the blood, which impacts insulin levels and weight loss. For instance, Dr. Sears discusses the use of low glycemic diets as a means of reducing inflammation in his 2005 book, The Anti Inflammation Zone. Dr. Sears' ZONE diet services, including his writing, teaching and consulting, focus on strictly limiting high glycemic foods, and replacing them with more nutrient-rich and lower glycemic choices.

15. Dr. Sears' ZONE branded health and nutrition products and services are widely known as a result of Dr. Sears' numerous and frequent live and taped

appearances, including seminars, conferences, radio shows, and network television interviews, throughout the United States.

16. In promoting his ZONE branded health and nutrition products and services, Dr. Sears has appeared on nationally-broadcast television shows, including The Today Show in 1996 and again in January 2005, 20/20 in 1999, Good Morning America on June 9, 2000, June 15, 2000 and again in May 2002, Dateline in July 2002, CBS Evening News on May 21, 2003, The Montel Williams Show on April 1, 2004, the 700 Club on October 1, 2008, and Live With Regis and Kelly on February 2, 2005. Dr. Sears has also promoted his ZONE nutrition and diet goods and services on numerous local television news affiliates, cable television programs and radio programs. Dr. Sears is a frequent invited speaker to numerous healthcare events and conferences, and most recently presented at the American Diabetes Association annual meeting on June 26-28, 2010.

17. Additionally, each year since 1998, Dr. Sears has conducted a week long ZONE branded seminar aboard a cruise ship, providing a series of presentations and demonstrations on mastering his hormonal and insulin control program, by using, among other things, low glycemic load foods.


18. Dr. Sears is well and favorably known throughout the United States and has built up valuable goodwill and reputation in the trademark ZONE and composite marks incorporating ZONE for health and nutrition products and services designed to help people control hormone levels and insulin levels.

19. Since 2003, Dr. Sears has provided nutritional supplements and meal replacement products for dieters in connection with the mark ZONE and compound



marks containing ZONE. These supplements and meal replacement products are compliant with Dr. Sears' lifelong hormonal and insulin control program that he branded ZONE in 1995.

20. Petitioner is the owner of approximately thirty six registered trademarks and service marks comprising or containing "ZONE".

21. By way of example, Petitioner owns the following United States Trademark Registrations, which, upon information and belief, issued prior to any date of first use that Respondent can claim.

<u>Mark</u>	<u>Reg. No.</u>	<u>Goods/Services</u>
ZONE	2,689,749	Publications, namely a series of books in the field of diet and nutrition
	3,059,308	<p>Providing on-line magazines, newsletters, bulletins, in the fields of diet, health and nutrition; providing online newsletters in the fields of diet, health and nutrition by e-mail</p> <p>Catering services; restaurant, café and snack bar services</p> <p>Computer services, namely, providing counseling services, information, and educational information in the fields of health and nutrition via the Internet; counseling services in the field of diet, health and nutrition; providing information in the fields of diet, health, and nutrition via e-mail</p>
ZONE FAST	3,128,070	Educational services, namely, conducting workshops, seminars and classes in the field of diet, health and nutrition and distributing course materials in connection therewith; providing educational information in the fields of health and nutrition
DR. SEARS ZONE	3,171,421	Breakfast cereals



	3,171,422	Breakfast cereals
ZONE LABS	3,254,087	Non-medicated skin care preparations and cosmetics  Vitamins, nutritional supplements, and nutritional food bars
DR. SEARS ZONEDIET.COM	3,176,214	Providing online magazines and newsletters in the fields of diet, health, and nutrition; providing online newsletters in the fields of diet, health and nutrition by e-mail
DR. SEARS ZONE	3,066,468	Retail store, catalog and mail order services featuring vitamins and nutritional supplements, nutritional food bars, health foods, and publications in the fields of diet, health and nutrition
DR. SEARS ZONE APPROVED	3,174,669	mail order services featuring vitamins and nutritional supplements, nutritional food bars, health foods, computer software and publications in the fields of diet, health and nutrition
DR. SEARS ZONE LABS	3,074,328	On-line retail store and mail order services featuring vitamins and nutritional supplements, nutritional food bars, health foods, edible oils and fats, non-medicated skin care preparations and cosmetics, and printed publications in the fields of diet, health and nutrition
	3,161,339	Retail store, catalog ordering and mail order services featuring vitamins and nutritional supplements, nutritional food bars, health foods, computer software and publications in the fields of diet, health and nutrition
ZONE LABS	3,080,411	On-line retail store, and mail order services featuring vitamins and nutritional supplements, nutritional food bars, health foods, edible oils and fats, non-medicated skin care preparations and cosmetics, and printed publications in the fields of diet, health and nutrition.

22. In accordance with Sections 7(b), 22 and 33(a) of the Lanham Trademark Act, Petitioner's above-cited registrations constitute prima facie evidence of the validity of the Registered Marks and of the registrations thereof, Petitioner's ownership of the marks shown in said registrations, and Petitioner's exclusive right to use the marks in commerce in connection with the goods and services named therein, without condition or limitation.

23. Said registrations constitute notice to Respondent of Petitioner's claim of ownership of the marks shown within such registrations.





24. The United States Trademark Registrations set forth in Paragraphs 21 are collectively referred to as the "ZONE Registered Marks."

25. Petitioner filed its Combined Declaration of Use & Incontestability under 15 U.S.C. §§ 1058, 1065 (Sections 8 & 15 of the Lanham Act) for its ZONE trademark registration, Reg. No. 2,689,749 resulting in said registration becoming incontestable.

26. In accordance with 15 U.S.C. § 1115(b), Petitioner's trademark Registration No. 2,689,749 for the mark ZONE is immune from claims that it lacks secondary meaning or is merely descriptive because of its incontestable status.

27. Dr. Sears owns the following common law trademarks and, upon information and belief, has used such marks since prior to Respondent's first use of the mark SWEET ZONE & Design:

<u>Mark</u>	<u>Date of First Use</u>	<u>Goods/Services</u>
ZONE	1998	Education and counseling services in the fields of diet, health and nutrition, meal planning services.
ZONE DIET	1998	Education and counseling services in

		the fields of diet, health and nutrition, meal planning services.
ZONE CRUISE	1998	Education and counseling services in the fields of diet, health and nutrition, meal planning services
ZONE CONSULTANTS	1998	Education and counseling services in the fields of diet, health and nutrition, meal planning services.
THE OMEGA ZONE	8/31/2002	Printed materials, namely newsletters and magazines in the fields of diet, health and nutrition, providing on-line newsletters and magazines in the field of diet, health and nutrition.
	11/2003	Vitamins, nutritional supplements, nutritional food bars for use as a nutritional supplement or meal replacement; prepared entrees consisting primarily of meat, fish, poultry or vegetables, edible oils and fats, nutritional food bars, namely protein based nutrient dense meal snack bars.
	1995	Printed materials namely, a series of books in the field of diet, health and nutrition.
	5/21/2004	Educational services, namely conducting workshops, seminars and classes in the fields of diet, health and nutrition, providing on-line magazines, newsletters, bulletins, in the fields of diet health and nutrition and providing on-line newsletters in the fields of diet, health and nutrition by e-mail; providing information in the fields of diet, health and nutrition via e-mail.
	11/2003	Non-medicated skin care preparations and cosmetics
ZONE LABS	11/2003	Non-medicated skin care preparations and cosmetics; vitamins, nutritional supplements and nutritional food bars.

Collectively the “ZONE Common Law Marks.”

28. Dr. Sears' trademark ZONE, the ZONE Registered Marks and the ZONE Common Law Marks have been extensively advertised and promoted in connection with Dr. Sears' goods and services in such a manner as to establish a family of marks, with "ZONE" being the family surname.

29. The trademark ZONE, the ZONE Registered Marks and the ZONE Common Law Marks are collectively referred to as the "ZONE Family of Marks."

30. Through his efforts over the past fifteen (15) plus years, Dr. Sears has established a strong customer base and is known nationally as a provider of quality goods and services in the fields of diet, health and nutrition. By virtue of the quality of his ZONE branded products and services, and as a result of his expenditure of considerable sums of money on advertising and promotional activity, Dr. Sears has built up valuable goodwill in his marks ZONE and ZONE DIET and the entire ZONE Family of Marks. Such marks and the goodwill they represent are of immeasurable value to Dr. Sears.

31. On March 18, 2008, Respondent filed an intent to use trademark application for the mark SWEET ZONE, App. Serial No. 77/424,798, for "Nutraceuticals for use as a dietary supplement, namely, low glycemic, non-cephalic, sweet L-arginine powder for use in foods for oral ingestion by humans", in International Class 5.

32. There is no issue as to priority. Respondent's Reg. No. 3,800,075 claims a date of first use anywhere and a date of first use in commerce, long after Petitioner began using its marks ZONE and ZONE DIET and the entire ZONE Family of Marks.

33. Respondent had constructive notice of Petitioner's ZONE Registered Marks prior to Respondent's filing of its application for the SWEET ZONE & Design mark.

34. Petitioner's actual and constructive date of first use claimed in U.S. Reg. No. 2,689,749 for ZONE is earlier than any date upon which Respondent can rely.

35. Petitioner's actual and constructive date of first use claimed in U.S. Reg. No. 3,059,308 for DR. SEARS ZONE is earlier than any date upon which Respondent can rely.

36. Petitioner's actual and constructive dates of first use claimed in U.S. Reg. No. 3,128,070 for ZONE FAST is earlier than any date upon which Respondent can rely.

37. Petitioner's actual and constructive dates of first use claimed in U.S. Reg. No. 3,171,421 for DR. SEARS ZONE is earlier than any date upon which Respondent can rely.

38. Petitioner's actual and constructive dates of first use claimed in U.S. Reg. No. 3,171,422 for DR. SEARS ZONE is earlier than any date upon which Respondent can rely.

39. Petitioner's actual and constructive dates of first use claimed in U.S. Reg. No. 3,254,087 for ZONE LABS is earlier than any date upon which Respondent can rely.

40. Petitioner's actual and constructive dates of first use claimed in U.S. Reg. No. 3,176,214 for DR. SEARS ZONE DIET.COM is earlier than any date upon which Respondent can rely.

41. Petitioner's actual and constructive dates of first use claimed in U.S. Reg. No. 3,066,468 for DR. SEARS ZONE is earlier than any date upon which Respondent can rely.

42. Petitioner's actual and constructive dates of first use claimed in U.S. Reg. No. 3,174,669 for DR. SEARS ZONE APPROVED is earlier than any date upon which Respondent can rely.

43. Petitioner's actual and constructive dates of first use claimed in U.S. Reg. No. 3,074,328 for DR. SEARS ZONE LABS is earlier than any date upon which Respondent can rely.

44. Petitioner's actual and constructive dates of first use claimed in U.S. Reg. No. 3,161,339 for ZONE is earlier than any date upon which Respondent can rely.

45. Petitioner's actual and constructive dates of first use claimed in U.S. Reg. No. 3,080,411 for ZONE LABS is earlier than any date upon which Respondent can rely.

46. Because the Respondent's mark prominently features the term ZONE, and Petitioner's Family of ZONE Marks all feature the term ZONE, Respondent's SWEET ZONE & Design mark for low-glycemic dietary supplements, is likely to be confused by consumers as a part of the family of ZONE marks owned by Petitioner.

47. The Respondent's mark and the Petitioner's ZONE Family of Marks are similar in sound and appearance and create the same commercial impression.

48. ZONE is the dominant feature of Petitioner's ZONE Family of Marks.

49. ZONE is a dominant feature of the ZONE Registered Marks.

50. ZONE is a dominant feature of the ZONE Common Law Marks.

51. ZONE in SWEET ZONE & Design, Reg. No. 3,800,075, comprises the dominant portion of the mark.

52. The Respondent's low glycemic dietary supplement and Petitioner's ZONE branded health and nutrition goods and services for dieters, including Petitioner's ZONE branded dietary supplements are related.

53. The use of ZONE by Respondent in SWEET ZONE & Design for low glycemic dietary supplements directed to dieters creates a similar commercial impression to Opposer's ZONE branded health and nutrition goods and services, including Opposer's ZONE branded dietary supplements.

54. On information and belief, Respondent's low glycemic dietary supplements are directed to individuals concerned about health, diet and nutrition.

55. The Respondent's SWEET ZONE & Design branded goods and the Petitioner's ZONE branded goods and services, including goods and services branded with any of the ZONE Family of Marks, will be sold to the same customers.

56. Respondent's Reg. No. 3,800,075 does not limit the channels of trade through which its goods will travel, nor does it limit the consumers to whom such goods are directed.

57. Respondent's goods as described in Reg. No. 3,800,075 are presumed to travel through all channels of trade and to be directed towards all relevant consumers.

58. There are no limits on the channels of trade or consumers for Petitioner's goods and services as described in the ZONE Registered Marks.

59. The Respondent's SWEET ZONE & Design branded goods as described in Reg. No. 3,800,075 and the Petitioner's ZONE branded diet and nutrition goods and services, including goods and services branded with the ZONE Family of Marks, are sold or offered through the same channels of trade.

60. Consumers are likely to believe that Respondent's SWEET ZONE & Design branded goods as described in Reg. No. 3,800,075, similarly marked and sold in the same channels of trade as Opposer's ZONE branded diet and nutrition goods and services, including those goods and services branded with the ZONE Family of Marks, come from or are sponsored or endorsed by the same source.

61. Consumers are likely to expect that Respondent's SWEET ZONE & Design branded low-glycemic supplement, designed to assist dieters with hormonal control and insulin balance, are of the same quality as Opposer's ZONE branded diet and nutrition goods and services.

62. Respondent's App. Serial No. 77/424,798 was accompanied by a signed declaration attesting to *bona fide* intent to use the mark in commerce in connection with all goods identified in said trademark application.

63. On May 12, 2009, Respondent was issued a Notice of Allowance for App. Serial No. 77/424,798.

64. On November 10, 2009, Respondent filed a Statement of Use for the goods listed in the Notice of Allowance, for App. Serial No. 77/424,798 namely "Nutraceuticals for use as a dietary supplement, namely, low glycemic, non-cephalic, sweet L-arginine powder for use in foods for oral ingestion by humans."

65. Respondent's Statement of Use for App. Serial No. 77/424,798 was accompanied by a signed declaration attesting to use of the mark SWEET ZONE & Design in commerce on or in connection with the goods contained in the Notice of Allowance.



66. Application Serial No. 77/424,798 and the Statement of Use were both signed by Respondent's authorized representative under the penalty of fine or imprisonment or both and with the knowledge that any willful false statements contained therein may jeopardize the validity of the application or resulting registration.

67. Upon information and belief, at the time Respondent signed and filed the Statement of Use, Respondent was not using SWEET ZONE & Design in connection with the goods listed in the application namely, "Nutraceuticals for use as a dietary supplement, namely, low glycemic, non-cephalic, sweet L-arginine powder for use in foods for oral ingestion by humans" and was not using said mark in commerce.

68. On June 8, 2010, Respondent obtained Registration No. 3,800,075 of the mark SWEET ZONE & Design for the goods issued in its Notice of Allowance App. Serial No. 77/424,798, namely, "Nutraceuticals for use as a dietary supplement, namely, low glycemic, non-cephalic, sweet L-arginine powder for use in foods for oral ingestion by humans."

69. Upon information and belief, Respondent has not used the mark SWEET ZONE & Design on or in connection with all of the goods listed in the application and registration.

FIRST GROUND FOR RELIEF (UNDER 15 U.S.C. § 1052(d))  
ZONE MARK

70. Petitioner incorporates by reference paragraphs 1 through 69 as if fully set forth herein.

71. The trademark ZONE has been used by Petitioner since a date prior to any date on which Respondent may rely.

72. Respondent's SWEET ZONE & Design mark is identical or confusingly similar to Petitioner's trademark ZONE in appearance and in commercial impression.

73. The goods of Respondent as set forth in Reg. No. 3,800,075 and sold in connection with the SWEET ZONE & Design trademark are related to Petitioner's diet and nutrition goods and services provided under the trademark ZONE.

74. Respondent's trademark SWEET ZONE & Design as shown in Reg. No. 3,800,075 consists of or comprises a mark which so resembles Petitioner's previously used and registered ZONE marks as to be likely, when used for the goods listed in the subject registration to cause confusion, cause mistake or to deceive the public into the belief that the products offered under SWEET ZONE & Design come from or are otherwise authorized or sponsored by Petitioner in violation of Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d).

**SECOND GROUND FOR RELIEF (UNDER 15 U.S.C. § 1052(d))**  
**ZONE REGISTERED MARKS**

75. Petitioner incorporates by reference paragraphs 1 through 74 as if fully set forth herein.

76. The trademarks set forth in the ZONE Registered Marks have been used by Petitioner since a date prior to any date on which Respondent may rely.

77. Respondent's SWEET ZONE & Design mark is confusingly similar to Petitioner's ZONE Registered Marks in appearance, sound and commercial impression.

78. The goods of Respondent set forth in Reg. No. 3,800,075 and sold in connection with the SWEET ZONE & Design trademark are identical to or related to Petitioner's diet and nutrition goods and services under the ZONE Registered Marks.

79. Respondent's trademark SWEET ZONE & Design as shown in Reg. No. 3,800,075 consists of or comprises a mark which so resembles each of Petitioner's previously used and registered ZONE Registered marks as to be likely, when used for the goods listed in the subject registration to cause confusion, cause mistake or to deceive the public into the belief that the products offered under SWEET ZONE & Design come from or are otherwise authorized or sponsored by Petitioner in violation of Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d).

THIRD GROUND FOR RELIEF (UNDER 15 U.S.C. § 1052(d))  
COMMON LAW MARKS

80. Petitioner incorporates by reference paragraphs 1 through 79 as if fully set forth herein.

81. The ZONE Common Law Marks have been used by Petitioner since a date prior to any date on which Respondent may rely.

82. Respondent's SWEET ZONE & Design mark is confusingly similar to Petitioner's ZONE Common Law Marks in appearance, sound and in commercial impression.

83. The goods of Respondent set forth in Reg. No. 3,800,075 and sold in connection with the SWEET ZONE & Design trademark are related to Petitioner's diet and nutrition goods and services under the ZONE Common Law Marks.

84. Respondent's trademark SWEET ZONE & Design as shown in Reg. No. 3,800,075 consists of or comprises a mark which so resembles each of Petitioner's previously used ZONE Common Law marks as to be likely, when used for the goods listed in the subject registration to cause confusion, cause mistake or to deceive the public into the belief that the products offered under SWEET ZONE & Design come from or are

otherwise authorized or sponsored by Petitioner in violation of Section 2(d) of the Lanham Act, 15 U.S.C. § 1052(d).

FOURTH GROUND FOR RELIEF  
NO BONA FIDE USE OF MARK IN COMMERCE

85. Petitioner incorporates by reference paragraphs 1 through 84 as if fully set forth herein.

86. Pursuant to 15 U.S.C. §1051(b), in an application based upon intent to use, the Respondent must actually use the mark in commerce on or in connection with all of the goods specified in the approved application prior to registration. *See* 15 U.S.C. §1051(b); Trademark Manual of Examining Procedure (TMEP) §901.

87. Pursuant to the Trademark Law Revision Act of 1988 (TLRA), Public Law 100-667, 102 Stat. 3935, “the bona fide use of a mark [must be] in the ordinary course of trade, and not made merely to reserve a right in the mark.” TMEP §901.02 instructs “the primary purpose of the [TLRA] amendment was to eliminate the practice of ‘token use,’ or use made solely to reserve rights in a mark.”

88. Under 37 C.F.R. §2.88(c), “the statement of use may be filed only when the Respondent has made use of the mark in commerce in connection with *all of the goods or services, as specified in the notice of allowance*, for which Respondent will seek registration in that application...” (emphasis added)

89. Under 37 C.F.R. §2.88(c) and the TLRA, the Respondent must have made use of the mark in commerce in connection with all goods and services specified in the Notice of Allowance in the ordinary course of trade or the Statement of Use can not be filed.

90. Upon information and belief, at the time Respondent filed its Statement of Use, Respondent failed to make *bona fide* use of the mark in commerce on or in connection with all goods identified in its Notice of Allowance in violation of 37 C.F.R. §2.88(c).

91. Upon information and belief, prior to issuance of Registration No. 3,800,075, Respondent failed to make *bona fide* use of the mark in commerce on or in connection with all goods identified in said registration in violation of 15 U.S.C. §1051(b).

92. Upon information and belief, Respondent has not made *bona fide* use of the mark in commerce on all goods identified in Registration No. 3,800,075 in violation of the Trademark Law Revision Act of 1988, Public Law 100-667, 102 Stat. 3935.

93. Pursuant to TBMP §309.03, proper grounds for cancellation of a trademark registration is failure of Registrant to make *bona fide* use of the mark in commerce prior to registration. *See, e.g., International Telephone and Telegraph Corp. v. International Mobile Machines Corp.*, 231 USPQ 142 (C.A.F.C. 1986); *See* TBMP § 308.02(a).

94. Upon information and belief, Respondent's failure to adhere to mandatory requirements under 15 U.S.C. §1051(b); 37 C.F.R. §2.88(c); Trademark Law Revision Act of 1988, Public Law 100-667, 102 Stat. 3935; TMEP §901, and TBMP §309.03 regarding *bona fide* use of the mark in commerce on or in connection with all goods identified in the registration prior to issuance of the registration constitutes adequate basis for cancellation of Registration No. 3,800,075.

95. The Petitioner has been and will continue to be damaged by continuance of said Registration No. 3,800,075 so long as the registration sought to be cancelled herein is maintained on the Register despite Respondent's lack of bona fide use of the mark SWEET ZONE & Design in commerce on the goods identified in the Registration.

WHEREFORE, the Petitioner requests that this Petition for Cancellation be sustained and that Trademark Reg. No. 3,800,075 issued to Nutrilab Corporation on June 8, 2010, be cancelled.

Respectfully submitted,

BARRY D. SEARS

By his attorneys,

/s/ Deborah L. Benson

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Dated: September 9, 2010

#### CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of September, 2010, I served a true and accurate copy of the foregoing Notice of Opposition, via Federal Express overnight mail, postage prepaid upon the Owner of Record, Nutrilab Corporation, 111 2<sup>nd</sup> Avenue N.E., Suite 512, St. Petersburg, FL 33701-4360 with a copy to counsel of record, Corey K. Cho, Saliwanchik, Lloyd & Saliwanchik, PO Box 142950, Gainesville, FL 32614-2950

/s/ Deborah L. Benson

Deborah L. Benson